Supreme Court, U.S.
FILED
MAR 6 - 2015

Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF HON. LAWRENCE J. KORB, RUDY F. DELEON, HON. WILLIAM J. LYNN, III, HON. PATRICK J. MURPHY, HON. JOE R. REEDER, VICE ADM. JOSEPH SESTAK, HON. DOUGLAS B. WILSON, AND SERVICE WOMEN'S ACTION NETWORK AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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[Additional Case Captions Listed on Inside Front Cover]

BRITTANI HENRY, *et al.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*,

Respondents.

VALERIA TANCO, *et al.*,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, *et al.*,

Respondents.

APRIL DEBOER, *et al.*,

Petitioners,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*,

Respondents.

GREGORY BOURKE, *et al.*, AND TIMOTHY LOVE, *et al.*,

Petitioners,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*,

Respondents.

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INTEREST OF *AMICI CURIAE*[1]

Amici are former high-ranking officers in the Armed Forces, former civilian leaders with responsibility for overseeing our nation's defense, and authorities on national security. They include former Department of Defense officials, Flag and General Officers, members of the United States House of Representatives, and an organization representing thousands of veterans. Their experiences provide unique insights into how these state prohibitions currently harm the military and what their future untoward consequences will be for our national security.

For gay and lesbian service members stationed in states that prohibit same-sex marriage and that do not recognize the validity of such marriages performed in other states, the laws undermine the military's significant efforts to provide gay and lesbian service members and their families with equal protections and rights. *Amici* believe that, if gay and lesbian service members and their families are stripped of the fundamental rights of marriage and parenthood simply because they are transferred to military installations in certain states, it will undermine the military's effectiveness. Accordingly, *amici* urge this Court to reverse the judgment upholding the validity of these bans.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution towards the preparation and submission of this brief. The respondents filed blanket consents to the filing of *amicus curiae* briefs. Petitioners consented to the filing of this brief.

Amici's views are based on decades of experience and accomplishment at the highest positions in our country's military leadership and our civilian leadership charged with oversight of national security. Biographical sketches of each *amicus* are included in the addendum to this brief.

SUMMARY OF ARGUMENT

This Court long ago concluded that marriage is the most important interpersonal relationship that humans experience, and is undeniably the foundation of the family and our society. *Maynard* v. *Hill*, 125 U.S. 190, 205, 210–11 (1888). The nation's military leadership, in turn, has recognized for decades that strong families are essential to mission success, and thus the military must support not only service members but also their families. More recently, military leaders have recognized that this principle applies to *all* military families, irrespective of the service member's sexual orientation.

Accordingly, soon after this Court's ruling in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), the military announced plans "to make the same benefits available to all military spouses, regardless of whether they are in same-sex or opposite-sex marriages." Secretary of Defense Chuck Hagel, Memorandum for Secretaries of the Military Departments, Under Secretary of Defense for Personnel and Readiness, *Extending Benefits to the Same-Sex Spouses of Military Members* 1 (Aug. 13, 2013) ("*Hagel Memo*"). The military has likewise unequivocally stated that it is "committed to ensuring that all men and women who serve our country and their families are treated fairly and equally." *Id.* at 2. The military recognizes, however, that the state laws at issue here remain an obstacle to ensuring that its service members and their

spouses and children enjoy equal protections. See, *e.g.*, *id.* at 1–2.

In fact, the harsh impact of these laws on gay and lesbian service members and their families demonstrates that the laws are unconstitutional. Members of the military make extraordinary commitments and sacrifices to protect the security of our nation—and thus the constitutional rights of all citizens. Among those sacrifices is the necessity of moving their families when assigned to new bases, many of which are located in states that prohibit and refuse to recognize same-sex marriages. As a result, gay and lesbian service members are burdened because of their inability to marry when they are based in these states, and already-married service members can lose fundamental rights and protections to which they were previously entitled because they have to serve in a location that our military mission commands. These rights include child custody, the ability to make medical decisions on behalf of their spouses, and legal rights of survivorship. Should a service member be killed or seriously harmed, which, of course, is a very real risk of service, or should death or serious injury befall his or her same-sex spouse, the service member's family may literally be undone as a result of the state in which the service member happens to be stationed.

Those willing to risk their lives for the security of their country should never be forced to risk losing the protections of marriage and the attendant rights of parenthood simply because their service obligations require them to move to states that refuse to recognize their marriages. The strains imposed on married gay and lesbian service members by such state laws can impair military readiness, morale, effectiveness, and the military's ability to recruit and retain talent-

ed personnel. The severity of these harms also wrongly deprives service members in same-sex marriages of the equal protection of the law.

ARGUMENT

I. EQUAL SUPPORT FOR MILITARY FAMILIES IS INTEGRAL TO NATIONAL SECURITY.

"[N]o governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981). This paramount interest is protected by the men and women of the U.S. military, and depends on the readiness and morale of each service member. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348, 356 (1980) (describing "morale, discipline, and readiness" as "essential attributes of an effective military force"). The leadership of the Armed Forces, in turn, has long known that military effectiveness depends on ensuring that military families are well-supported, and that satisfied and secure military families are key to recruiting and retaining service members.

If military personnel are worried about their families' well-being, then readiness, morale, effectiveness, and unit cohesion suffer. The Army, for instance, has concluded that "soldiers cannot perform efficiently while distracted by overwhelming family concerns." See Chief of Staff, U.S. Army, *White Paper 1983: The Army Family* 13–14 (Aug. 1983) ("*The Army Family*"). The Air Force leadership explained to Congress that "when we take care of Air Force families, airmen are free from distractions and better able to focus on the mission," *Department of Defense Authorization for Appropriations for Fiscal Year 2010: Hearing before the S. Comm. on Armed Services, Part 6 Personnel*, 111th Cong. 181 (2009) (statement of Eliza G.

Nesmith, Chief, Airman and Family Services Division, U.S. Air Force), and that "[w]hen our men and women are in harm's way, if they are not confident their families are fully cared for, they will not be focused on what is in front of them," *The Military Health System: Health Affairs/Tricare Management Activity Organization: Hearing before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 111th Cong. 19 (2009) (testimony of Lt. Gen. James G. Roudebush, Surgeon General, U.S. Air Force).

The Armed Forces treat the well-being of military families as integral to military readiness. For example, the Marine Corps has summarized that "[p]ersonal and family readiness is a combat multiplier, equally as important as individual, equipment and combat readiness." Dep't of the Navy, Marine Corps Order 1754.9A, at 1-1 (Feb. 9, 2012).[2]

Given the demographics of the contemporary all-volunteer force, strength of service members' families

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[2] *Accord Department of Defense Authorization for Appropriations for Fiscal Year 2013 and the Future Years Defense Program: Hearings before the S. Comm. on Armed Services, Part 6 Personnel*, 112th Cong. 325 (2012) (joint prepared statement of Dr. Karen S. Guice, Principal Deputy Assistant Secretary of Defense for Health Affairs, and Dr. Rebecca L. Posante, Deputy Director, Office of Community Support for Military Families with Special Needs) (The Defense Department "consider[s] 'family readiness' as an essential element of our Readiness strategy."); Commander, Navy Installations Command and Naval Services Family Line, *Sea Legs: A Handbook for Navy Life and Service* 2 (2013) ("[F]amily readiness is considered to be an essential element of mission readiness."); Eric K. Shinseki, *The Army Family: A White Paper* 1 (2003) ("Rather than being peripheral concerns, family issues [are] now absolutely essential to both retention and readiness and thus to the success of the Army.").

is more important than ever. While only about 40 percent of enlisted members were married at the start of the all-volunteer force, see Bernard D. Rostker, *I Want You!: The Evolution of the All-Volunteer Force* 7 (2006), at present, well over half of all active-duty enlisted personnel are married, see Dep't of Def., *2013 Demographics Profile of the Military Community* 41 fig.2.53 (2013) ("*2013 Military Demographics*"). Over 69 percent of active-duty officers are married, see *id.* at 40 fig.2.52, and active-duty military members are more likely to be married than the adult U.S. population as a whole, see *id.* at 40 fig.2.51. Of those married military members, over two-thirds have children. See *id.* at 112 fig.4.03. And the vast majority of career military members have families. See Rostker, *supra*, at 687. In total, military personnel have some 1,644,774 dependents. See *2013 Military Demographics* at 184.

Therefore, the military has increasingly devoted attention to developing and executing policies to support military families. See, *e.g.*, Dep't of Def., Instruction No. 1342.22, *Military Family Readiness* 14–23 (July 3, 2012); Office of the Chairman of the Joint Chiefs of Staff, *Keeping Faith with our Military Family* 1 (Nov. 2012) ("The All-Volunteer Joint Force is our Nation's decisive advantage, and its lifeline is our military family."). Moreover, the military has made a "social compact—a written commitment to improve life in the military, and underwrite family support programs." *The Needs of Military Families: How Are States and the Pentagon Responding, Especially for Guard and Reservists?: Joint Hearing before the Subcomm. on Children and Families of the S. Comm. on Health, Education, Labor, and Pensions and the Subcomm. on Personnel of the S. Comm. on Armed Services*, 108th Cong. 50 (2004) (statement of Charles

S. Abell, Principal Deputy Under Secretary of Defense for Personnel and Readiness). The military "acknowledge[s] the reciprocal nature of the relationship between the accomplishments of the DoD mission and quality of life. Families also serve." *Id.* Stated differently, "[t]he nature of the commitment of the servicemember dictates to the Army a moral obligation to support their families." *The Army Family* at 1.

The defense leadership has recognized that these commitments are important both to military effectiveness today and well into the future. The Department of Defense emphasizes that "[p]roviding a high quality of life for our military members and their families is essential to our effort to attract and retain a quality force." *Defense Department Authorization for Appropriations for Fiscal Year 2002: Hearing before the S. Comm. on Armed Services, Part 6 Personnel*, 107th Cong. 140 (2001) (statement of David S. C. Chu, Under Secretary of Defense for Personnel and Readiness); see generally Chris Jehn, Former Assistant Secretary of Defense for Force Management and Personnel, *Introduction*, *The All-Volunteer Force: Thirty Years of Service* 55, 55–56 (Barbara Bicksler et al. eds., 2004) ("Effective recruiting and retention is extraordinarily important, indeed essential, for sustaining the all-volunteer force. If the Department of Defense is unsuccessful in attracting and retaining quality people, other successes are unimportant."). Family considerations have proven critical to retention efforts. "The Army saying that 'we enlist an individual and reenlist a family' ha[s] become a nearly universal reality." See Rostker, *supra*, at 687. Service members are far more likely to continue their military careers if their families are well-supported. See, *e.g.*, *Department of Defense Authorization for*

Appropriations for Fiscal Year 2013 and the Future Years Defense Program: Hearings before the S. Comm. on Armed Services, Part 6 Personnel, 112th Cong. 50 (2012) (statement of David L. McGinniss, Acting Assistant Secretary of Defense for Reserve Affairs).

After the repeal of "Don't Ask, Don't Tell" ("DADT") and this Court's decision in *Windsor*, the military recognized that its moral obligations toward military families applied every bit as much to the families of gay and lesbian service members as to all others. While still under the strictures of section 3 of the Defense of Marriage Act ("DOMA"), the Secretary of Defense extended benefits to same-sex partners of service members. Secretary of Defense Leon Panetta, Memorandum for Secretaries of the Military Departments, Acting Undersecretary of Defense for Personnel and Readiness, *Extending Benefits to Same-Sex Partners of Military Members* 1–2 (Feb. 11, 2013) ("*Panetta Memo*"). He emphasized that "'[t]aking care of our service members and honoring the sacrifices of all military families are two core values of this nation.'" *Panetta Signs Memo Extending Benefits to Same-Sex Partners*, American Forces Press Service, Feb. 11, 2013 (quoting Secretary of Defense Panetta).

Since *Windsor*, the Pentagon has been even clearer about the importance of providing equal treatment for service members in same-sex marriages and their families. See, *e.g.*, *Hagel Memo* at 1 ("welcom[ing] the Supreme Court's [*Windsor*] decision"); *id.* at 2 ("The Department of Defense remains committed to ensuring that all men and women who serve our country and their families are treated fairly and equally."). Last year, for instance, the Deputy Assistant Secretary of Defense for Military Community and Family Policy emphasized that "'[o]ur military will no longer be deprived of the talents and skills of

patriotic Americans just because they happen to be gay or lesbian. . . . And now we can say of our military spouses and partners, "Welcome aboard."" Amaani Lyle, *AMPA Dinner Honors Gay, Lesbian Military Families*, American Forces Press Service, May 18, 2014 (quoting Deputy Assistant Secretary Rosemary Freitas Williams).

For its part, the military has made good on these commitments to the families of gay and lesbian service members. See, *e.g.*, Memorandum from the Attorney General to the President, *Implementation of United States* v. *Windsor* 3, attach. at 1 (June 20, 2014) (citing the Pentagon's implementation of equal treatment for married same-sex couples and married opposite-sex couples). However, the Pentagon has found that state laws like those challenged here impede its interest in ensuring that service members in same-sex marriages receive equal treatment. See, *e.g.*, *Hagel Memo* at 1–2 (stating that the Department of Defense would need to take additional measures to "help level the playing field between opposite-sex and same-sex couples" when "same-sex couples [are] not stationed in a jurisdiction that permits same-sex marriage"); Letter from the Under Secretary of Defense for Personnel & Readiness to S. Peters, President, The American Military Partner Association 2 (Aug. 7, 2014) ("In regard to support to military families stationed in states that have not adopted same-sex marriage laws, DoD provides the greatest possible support *within the law* to all military families regardless of the gender of spouses. . . . DoD does not, however, have authority to specify how states should implement Federally-mandated requirements . . . .") (emphasis added). As detailed below, the same-sex marriage and recognition bans challenged here have special significance for military families given where

such families are based, *infra* § II, and these laws affect the most significant aspects of what equal protection means for a service member in a same-sex marriage and his or her family, *infra* § III.

II. SERVICE MEMBERS HAVE LITTLE CONTROL OVER WHERE THEY ARE STATIONED, AND SEVERAL HUNDRED THOUSAND ARE BASED IN STATES WITH SAME-SEX MARRIAGE BANS.

The laws at issue in this case have a dramatic effect on married gay and lesbian service members and their families, as well as gay and lesbian service members who wish to marry, because of the number of military installations located in states that ban same-sex marriages and the fact that service members cannot choose where to live.

Including Nebraska, whose law was held unconstitutional very recently in a decision that the State has appealed, 13 states do not recognize same-sex marriage,[3] whether through a constitutional amendment or state law, and twelve of these states refuse to recognize valid same-sex marriages from other states.[4] There are 43 military installations located in these 13 states, including some of the largest military bases in the United States, such as Fort Campbell (on the

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[3] Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Ohio, South Dakota, Tennessee, and Texas are the others. Of course, if this Court affirms the judgments here, the number of states with such prohibitions could increase given that other states' laws have been invalidated on constitutional grounds rejected by the Sixth Circuit in the decision below.

[4] Missouri recognizes same-sex marriages from other states. *Barrier v. Vasterling*, No. 1416-CV03892, 2014 WL 5469888 (Mo. Cir. Ct. Oct. 27, 2014).

Kentucky-Tennessee border), Fort Hood (Texas), Fort Benning (Georgia), and Wright-Patterson Air Force Base (Ohio). *2013 Military Demographics* 176–85. In total, approximately 25 percent, or 309,911, of the 1,192,839 active duty service members in the United States are stationed in the 13 states with same-sex marriage bans. *Id.* Including service members' dependents, approximately 751,962 members of military families live in these states. *Id.*

Moreover, that military personnel and their dependents frequently relocate is among the best-known facts of military life. While the contemporary United States is a mobile society, the moves of military families are quantitatively and qualitatively very different than the moves of the civilian population. Thus, their rights can change by the year unless this Court settles the fundamental issue of same-sex marriage and its constitutional validity now.

Military personnel are approximately 2.4 times more likely to move than employed civilians. On average, military personnel move once every two to three years. Melanie A. Rapino & Julia Beckhusen, U.S. Census Bureau, *The Migration of Military Spouses Using the 2007-2011 5-Year American Community Survey* 1 (2013). Installations in states with prohibitions against same-sex marriage are among the most frequent relocation destinations for military families. For instance, the Fort Hood metropolitan statistical area is the fifth-most-common metropolitan destination for military spouses. See *id.* at 12–13. There is thus a significant likelihood that gay or lesbian service members will be stationed in a state with a same-sex marriage ban at some point during their military career.

Military relocations significantly differ from civilian moves. Civilians typically have discretion whether

and where to move; in the worst case, civilians can avoid an employer-mandated move by resigning from their jobs. In contrast, although military personnel have some input about assignment preferences, their relocation decisions and destinations are ultimately dictated by military necessity and those moves are by and large meant to promote military preparedness, which is critical to national security. Moreover, service members, unlike civilians, lack the ability to avoid a move by resigning.

Even under the best circumstances, the stresses inflicted by such moves are obvious, and the military has dedicated considerable resources to studying and supporting the needs of its families facing relocation. See, *e.g.*, U.S. Army, *Welcome to the Army Family: A First Guide for Army Spouses and Family Members* 12–14 (2005). However, given the number of installations that fall within states that prohibit same-sex marriages, the military has no realistic ability to avoid placement of its gay and lesbian personnel in such jurisdictions and no ability to alleviate the repercussions of such state laws on those service members and their families.

Upon relocation to installations in states with the type of prohibitions challenged here, service members who wish to marry their same-sex partners (even partners with whom they have biological or adopted children), see, *e.g.*, Pet'r DeBoer Br. 20, 37,[5] and, moreover, service members with same-sex spouses and their families necessarily will incur new and unequal burdens. See, *e.g.*, Pet'r Tanco Br. 4, 7–8, 49–

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[5] The Department of Defense has tried to mitigate this by implementing policies to allow service members to take nonchargeable leave for the purpose of traveling to another jurisdiction that will allow them to marry. *See, e.g.*, *Hagel Memo* at 1.

50. Indeed, as described below, upon transfer, those state laws will invalidate the service members' existing marriages and much of what it means to be a family. Service members in opposite-sex marriages and their families can take the legal validity of their family as a given, can trust in the legal stability of their family units throughout their time in service, and can expect and rely on different states having a consistent understanding of what constitutes a family. Service members in same-sex marriages and their families retain none of these basic protections, and instead need to serve the nation with the knowledge that they are one transfer away from losing the legal status of their spouses and the basic rights and protections their marriages have afforded them.

III. STATE REFUSALS TO RECOGNIZE THE SAME-SEX MARRIAGES OF MILITARY MEMBERS DENIES EQUAL PROTECTION TO THOSE SERVING TO PROTECT THE SECURITY AND RIGHTS OF ALL CITIZENS.

More than 120 years ago, this Court held that marriage is "the most important relation in life," and "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard*, 125 U.S. at 205, 210–11. This Court's subsequent decisions establish that the marital relationship is protected from arbitrary government restriction. In *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), the Court held "[w]ithout doubt" that the term "liberty" includes the "right of the individual . . . to marry, establish a home and bring up children." *Id.* at 399. The Court thus struck down, as an arbitrary restraint of liberty, a statute that interfered with the right of a married couple to choose whether their child would be instructed in a foreign language. *Id.*

at 400–01. Two years later the Court held that a state law compelling attendance at a public school "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), the Court held that the "marriage relationship" lies within a "zone of privacy" that the Constitution protects from arbitrary government intrusion. *Id.* at 485–86. For this reason, the Court held unconstitutional a state law that invaded "the sacred precincts of marital bedrooms" and interfered with the rights of "*married persons*" to receive medical advice and prescriptions for contraception. *Id.* at 480, 485–86. And most recently, in *Windsor*, the Court invalidated section 3 of DOMA because it impermissibly burdened same-sex marriages, "diminishing the stability and predictability of basic personal relations [that a] State has found it proper to acknowledge and protect." 133 S. Ct. at 2694.

Gay and lesbian service members married in states that permit same-sex marriages enjoy all of the fundamental rights that attach to the marital relationship. But when the military transfers a married gay or lesbian service member (and, effectively, his or her same-sex spouse) to an installation in a state that bans and refuses to recognize same-sex marriage, the stability and predictability of the couple's relationship and day-to-day lives change drastically, as many aspects of their marriage are no longer recognized. In these states, married gay and lesbian service members and their families are denied basic benefits and risk being left unprotected against the common and catastrophic accidents that are a part of life. These severe impacts leave the Armed Services less able

and equipped to protect the nation. More pertinently, these laws so arbitrarily restrain the liberty interests of those serving to protect the liberty of others that they deprive such service members of the equal protection of the law.

A. State Same-Sex Marriage Bans Impermissibly Burden Military Families

Depriving Service members And Their Spouses of Parental Rights. One of the most fundamental and personal parts of family life is the decision to have or adopt children. However, for same-sex service members stationed in states with same-sex marriage bans, that decision may be greatly impeded if not taken away altogether. See, *e.g.*, Michael Biesecker & Julie Watson, *Same-Sex Military Spouses Lose Out in NC*, Citizen-Times, Sept. 23, 2014 (discussing how North Carolina's now-invalidated prohibition against same-sex marriage barred a corporal assigned to North Carolina from legally adopting her spouse's biological child). A gay or lesbian service member stationed with his or her same-sex partner in a state with a marriage ban faces many barriers to maintaining or starting a family.

Under the common law, a child born biologically to a married opposite-sex couple is presumed, for legal-recognition purposes, to be the child of that couple. See *Michael H.* v. *Gerald D.*, 491 U.S. 110, 124 (1989) (plurality op.). Those couples need not take any more steps to prove their parental rights. Not so with same-sex couples.

For example, a biological child may be born to a woman legally married to another woman in New York State. Under New York law, both women are recognized as the parents of the child. *In re Seb C-M*, File No. X 2013-21, NYLJ 1202640083455 (N.Y. Sur-

rogate Ct., Kings Cnty. Jan. 6, 2014); James McKinley Jr., *N.Y. Judge Alarms Gay Parents by Finding Marriage Law Negates Need for Adoption*, N.Y. Times, Jan. 28, 2014, at A17. But a transfer to a state that does not recognize same-sex marriage may result in the spouse who did not bear the child being stripped of all parental rights. See, *e.g.*, Pet'r Obergefell Br. 9–10.

Adoptions are generally recognized by other states under the Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, § 1, because they are court-ordered. See *Adar* v. *Smith*, 639 F.3d 146, 158–59 (5th Cir. 2011) (en banc); *Obergefell* Pet. App. 153a–157a n.i (*Henry* v. *Himes* district court op.); see generally *Baker ex rel. Thomas* v. *Gen. Motors Corp.*, 522 U.S. 222, 233 (1998). A state is not generally obligated, however, to give full faith and credit to another state's statute. *Baker*, 522 U.S. at 232; *Pac. Emp'rs Ins. Co.* v. *Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939) (explaining that "in the case of statutes . . . we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute . . . the conflicting statute of another state").[6] Thus, a spouse who receives parental rights through a marriage statute may be denied those rights if the family moves to a state that does not recognize a marriage between spouses of the same sex. See, *e.g.*, Pet'r Tanco Br. 4.

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[6] An adoption order from a state that recognizes same-sex marriage may carry its own, if less severe, complications, because some circuits have drawn a distinction between recognizing an out-of-state same-sex adoption, and enforcing that adoption. *See, e.g.*, *Adar*, 639 F.3d at 158–59; *Finstuen* v. *Crutcher*, 496 F.3d 1139, 1153 (10th Cir. 2007); *see also Obergefell* Pet. App. 148a, 153a–157a n.i.

For the parent who no longer has equal rights toward the child, second-parent adoption may be a potential solution, although it is not recognized in all States. See, *e.g.*, Pet'r DeBoer Br. 54–55; Pet'r Bourke Br. 9; see generally Lambda Legal, *In Your State*, http://www.lambdalegal.org/states-regions (last viewed Mar. 4, 2015) (Interactive Map) (Arkansas, Louisiana, Mississippi, North Dakota, and South Dakota do not permit second-parent adoption, and in other states the right varies by county). Even where a legal avenue exists, second-parent adoptions are expensive and intrusive. MAP et al., *All Children Matter, How Legal and Social Inequalities Hurt LGBT Families* (Oct. 2011) ("*All Children Matter Report*"). The second-parent adoption process imposes unwarranted financial and emotional burdens on military families. Second-parent adoptions also take time; it may take up to a year for an adoption to be made official. *Id.* During that time, the same-sex spouse, who until the move to a new state had been a legally-recognized parent, will have no legal rights or responsibilities toward the child.

Consistent with the foregoing, if a gay or lesbian service member or his or her spouse is unable to obtain, or is stripped of parental rights following a transfer to a state with a same-sex marriage ban, this legal status puts their children at risk. See Pet'r Bourke Br. 9–10; Biesecker & Watson, *supra*. For example, children generally cannot give legal consent to medical treatment, and a parent or guardian must instead make medical decisions for them. Human Rights Campaign, *Same-Sex Partners and Consent for Treatment of a Minor*, http://www.hrc.org/resources/entry/same-sex-parents-and-consent-

for-treatment-of-a-minor (last viewed Mar. 3, 2015).[7] If same-sex spouses are not recognized as parents by the state, they can be denied the ability to make medical choices for their children in an emergency or otherwise, see Pet'r Bourke Br. 9–10; Tex. Fam. Code Ann. § 32.001(a)(5) (allowing consent by a non-parent only if the parent is unavailable and the "adult who has actual care, control and the possession of the child . . . has written authorization to consent from a person having the right to consent"), or may have their ability to make such decisions trumped by others, see Miss. Code Ann. § 41-41-3 (priority statute granting eligibility to parents, guardians, siblings and grandparents, or, if none are available, an adult who "has exhibited special care and concern for the minor").

Some couples prepare powers of attorney for parental rights, but preparing a power of attorney requires an additional financial commitment and "the unfamiliarity of medical providers with the legal processes involved can limit how effective such documents are in practice." *All Children Matter Report* at 87; see Pet'r Obergefell Br. at 10. And, sadly, the need often only arises in emergency situations in which there is no time to secure such documents.

Perhaps most egregiously, should either spouse die—whether in an accident or *in combat*—the various states' refusals to recognize these service members' marriages can cause significant custody problems. See Pet'r DeBoer Br. at 6. If, for example, the

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[7] Other complications for parents range from inability to register their children for school to inability to add children to insurance policies. *See, e.g.*, Pet'r Obergefell Br. 11–12; Tara Siegel Bernard, *A Family With Two Moms, Except in the Eyes of the Law*, N.Y. Times, July 20, 2012, at B1.

service member is the biological or otherwise state-recognized legal parent and dies in service of the nation, the remaining "non-legal parent may have no rights to custody or even visitation with [his or her] child." Nat'l Ctr. for Lesbian Rights, *Legal Recognition of LGBT Families* 5 (2014). It is hard to envision what could dishonor a fallen service member more than to take away the love and care of the child's surviving parent simply because the service member had the misfortune of being transferred to a state with a same-sex marriage ban before dying abroad.

This situation is untenable. A move compelled in service to the nation should not result in disruption—indeed, legal dissolution of—service members' families in fundamental ways. The energy same-sex families must expend in an attempt to retain parental rights over their children undermines the military's need for focused service members with stable families. The legal burdens same-sex spouses bear vis-à-vis their children when moving to a new state cannot help but to weigh on service members' minds when readiness is critical and to undermine the military's ability to retain excellent talent.

Denial Of Medical Surrogacy Rights. Accidents happen everyday, hurting the old and young, gay, lesbian, and heterosexual alike. When an individual suffers a heart attack or is injured in a car crash, the expectation is that one's spouse will be at his or her side overseeing the healthcare, including making necessary decisions if the injured spouse is incapacitated.

For opposite-sex spouses, these powers automatically derive from states' medical-surrogacy laws, which recognize one's spouse as the default decision-maker if incapacitated. See, *e.g.*, Ark. Code Ann. § 20-6-105(c)(4)(A); Ga. Code Ann. § 31-36A-6(a)(4);

Ky. Rev. Stat. § 311.631(1)(c); Miss. Code Ann. § 41-41-211(a)(2); Tenn. Code Ann. § 68-11-1806(c)(3); Tex. Health & Safety Code Ann. § 313.004(a)(1). However, in states that do not recognize same-sex marriages, married gays and lesbians lack the same rights. Thus, a service member's spouse could be critically injured, and the service member could be legally frozen out of the medical decisionmaking process or even denied visitation rights. See Pet'r Bourke Br. 56–57.

Financial Burdens and Limitations. In addition to striking at the very structures of families and the most emotional aspects of family life, the laws in question inflict a variety of harms on the financial well-being of families headed by same-sex spouses. Whereas the federal government now permits same-sex spouses to file income taxes jointly, states with same-sex marriage bans require such couples to prepare an alternate set of dummy federal tax returns that show what each spouse's tax liabilities would be if they filed federal taxes separately. For instance, in Ohio, same-sex spouses must complete a Schedule IT S, "Federal AGI to be Reported by Same-Gender Taxpayers Filing a Joint Federal Return." Joseph W. Testa, Tax Commissioner, *Individual Income Tax—Information Release* (Oct. 11, 2013). This form, requires same-sex spouses to calculate their federal adjusted gross income again, complete with itemized deductions, as if they were single individuals. Other states have followed suit.[8]

These couples must also divide up intermingled finances to account for charitable and other deduc-

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[8] *See, e.g.*, Ga. Dep't of Rev., Informational Bulletin IT-2013-10-25 (Oct. 25, 2013); Kan. Dep't of Rev., Notice 13-18, Guidance for Same-Sex Couples (Oct. 4, 2013); Ky. Dep't of Rev., *Kentucky Tax Alert* (Nov. 2013).

tions. If there are children, they must allocate the dependant children for adoption and child-care credits.[9] Not only does this practice force service members and their families to expend more resources on tax preparation, but it also denies them any marriage bonus available to opposite-sex couples.[10] As a result, being transferred to a military installation in a non-marriage-equality state results in additional financial hardship and inconvenience that does not exist for service members married to someone of the opposite sex.

These financial indignities continue after the death of one spouse. If a service member's opposite-sex civilian spouse died, the service member and any of the deceased spouse's minor children would receive death benefits in most states. Many states provide general workers-compensation survivorship benefits. See, *e.g.*, Ga. Code Ann. §§ 34-9-13(b)(1); 34-9-265(b)(2); Ky. Rev. Stat. § 342.750(1)(a)–(b); Ohio Rev. Code § 4123.59(B), (D)(1); Tenn. Code Ann. § 50-6-210(a)(1), (e)(1); Tex. Lab. Code Ann. § 408.182(a)–(b). Others provide pension benefits for public employees. See, *e.g.*, Ark. Code Ann. § 24-4-608(c)(1); Mich. Comp. Laws § 38.1389; Mo. Rev. Stat. § 104.140. Such survivorship benefits provide immediate income assistance, income replacement, and unpaid compensation to the spouse and children left behind. See Patrick Mackin, Richard Parodi & David Purcell, *Review of Survivor Benefits, in Eleventh Quadrennial*

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[9] *See* Ben Steverman, *Gay Couples' Tax-Season Nightmares Continue*, BloombergBusiness (Feb. 17, 2015); *All Children Matter Report* at 67–72.

[10] *See* Tax Policy Ctr., *Marriage Bonus and Penalty Tax Calculator*, http://taxpolicycenter.org/taxfacts/marriagepenaltycalculator.cfm (last reviewed Mar. 4, 2015).

Review of Military Compensation: Supporting Research Papers 543 (2012).

For service members who lose a same-sex spouse, however, these benefits are not available in many states with marriage bans, because "spouse" includes only those of the opposite sex. See, *e.g.*, *Glossip* v. *Mo. Dep't of Transp. & Highway Patrol Emps.' Ret. Sys.*, 411 S.W.3d 796 (Mo. 2013) (denying survivorship benefits to same-sex partner of highway patrolman killed in the line of duty). Thus, a service member stationed in a state that bans same-sex marriage—at a time in which the service member would need maximum support—would be denied public benefits that his or her spouse had earned due solely to the state's refusal to recognize the service member's marriage. Consequently, gay and lesbian service members' families find themselves at greater risk on account of the military's needs and their desire to serve. Such risk threatens to distract service members from their work and deters able and conscientious gays and lesbians from serving their country.

Moreover, if the spouse was without a will, the surviving service member may be denied any right to his or her spouse's estate. As with the other state laws, intestate succession depends upon whether a state recognizes a surviving partner as a spouse. See, *e.g.*, Ga. Code Ann. § 53-2-1(c); Mich. Comp. Laws § 700.2102; Ohio Rev. Code § 2105.06; Tenn. Code Ann. § 31-2-104(a); Tex. Estates Code Ann. § 201.001(a). Consequently, because same-sex spouses do not fit within these states' intestate succession schemes, a widow can be left with no rights to his or her deceased same-sex spouse's property.

Finally, even if a surviving service member did inherit the estate, many states require same-sex widows and widowers to pay estate and inheritance taxes

at a higher rate. For example, Kentucky allows "spouses" to pay a significantly lower inheritance tax than non-blood relatives. See Ky. Rev. Stat. § 140.070(1), (3). Ohio similarly grants a "marital deduction" from the estate tax for which same-sex spouses are ineligible. Ohio Rev. Code § 5731.15. Because same-sex spouses do not qualify for these preferential rates, they are punished if their partner is a resident of Kentucky or Ohio (by choice or not) and passes away.

Denial of Divorce Rights. The right to divorce is a counterpart to the ability to marry. But, like all other aspects of same-sex marriages, a move to a state with a same-sex marriage ban often negates any divorce rights the same-sex couple previously enjoyed.

If a gay or lesbian service member and his or her spouse move to a military base in a state that refuses to recognize their marriage and the couple subsequently decides to divorce, they may be unable to do so. States that refuse to recognize same-sex marriage often refuse to grant same-sex divorce because allowing divorce would give legal effect to a right or responsibility stemming from a same-sex marriage. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 665, 670 (Tex. App. 2010), *review granted* (Aug. 23, 2013) (holding that "Texas courts lack subject-matter jurisdiction to entertain a suit for divorce that is brought by a party to a same-sex marriage, even if the marriage was entered in another state that recognizes the validity of same-sex marriages"); Ga. Code Ann. § 19-3-3.1(b) ("No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage . . . . and the courts of this state shall have no jurisdiction whatsoever under any circum-

stances to grant a divorce or separate maintenance with respect to such marriage or otherwise").

Being unable to divorce can pose many problems for a same-sex couple. See Pet'r DeBoer Br. 24–25; Pet'r Tanco Br. 39, 57. For example, the couple will "continue to have the rights and responsibilit[ies] of married spouses" if they travel outside of the state or to states that recognize same-sex marriages. Nat'l Ctr. for Lesbian Rights, *Divorce for Same-Sex Couples Who Live in Non-Recognition States: A Guide for Attorneys* 1 (2013). This kind of a patchwork legal scheme is intolerable and indefensible.

If a couple is not considered married in the eyes of the state, then they do not have access to the support structures that come with divorce proceedings. These proceedings allow a couple's separation to occur in a structured way with specific guidelines about property division, child support, child custody, and alimony. Without guidelines in place and a court overseeing the separation, couples may not be able to protect themselves. For example, the non-legal parent may lose custody and visitation rights to his or her child entirely because the state does not recognize him or her to be a parent, see Lambda Legal, *In the Matter of L.K.M.*, http://www.lambdalegal.org/in-court/cases/in-the-matter-of-lkm (last viewed Mar. 4, 2015), or the member of the couple who does not have legal parental rights over the children may avoid child support.

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As demonstrated above, all service members in same-sex marriages risk being stationed in states where their marriages are unrecognized. The ramifications of such non-recognition are numerous and severe, and they undermine the military's stated goals of treating all of its personnel fairly and equally, see,

e.g., *Hagel Memo* at 2—benefits that ultimately accrue to the nation.

B. State Same-Sex Marriage Bans Strip Dignity And Respect From Strong Military Families.

Rather than ensuring that "all America's sons and daughters who volunteer to serve our Nation in uniform are treated with equal dignity and respect, regardless of their sexual orientation," *Panetta Memo* at 2, the state laws at issue altogether remove dignity and respect from those individuals and families, by limiting the protections afforded same-sex couples and their children. By rejecting marriage equality and depriving gay and lesbian service members—and their spouses and children—of vital legal protections, these state laws "impose a disadvantage, a separate status, and so a stigma" on all gay or lesbian service members who must move to these states due to military necessity. *Windsor*, 133 S. Ct. at 2693. They render some of our most valiant citizens deeply and publicly vulnerable.

Particularly in light of the many ways in which these laws pose a special threat to children who face a material risk of losing a parent to service of country, see *supra* at 15–19, there should be no doubt that these laws make "it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their communit[ies] and in their daily lives." *Windsor*, 133 S. Ct. at 2694. These laws instruct the children of gay and lesbian military personnel that their families are abnormal, unstable, vulnerable, and inferior. In fact, these families are an essential part of our military and, therefore, our nation's strength.

Service members in same-sex marriages willingly embrace both their oaths of service and their marriage vows. Given the frequency of military relocation, however, gay or lesbian service members will inevitably confront the real risk of living in one of the 13 states with laws against same-sex marriages. And when ultimately faced with the choice of whether to continue to serve, gay or lesbian service members' interest in protecting their country may be pitted against their need to protect their families. They should not have to make such a coercive decision, and military preparedness will be undermined if they have to make that intolerable choice.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

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March 6, 2015

ADDENDUM

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Biographies of *amici curiae*

Honorable Lawrence J. Korb, Ph.D, served as Assistant Secretary of Defense for Manpower, Reserve Affairs, Installations and Logistics (1981–1985). Dr. Korb served on active duty as a Naval Flight Officer and retired from the Naval Reserve with the rank of Captain.

Rudy F. deLeon served as the Deputy Secretary of Defense from 2000 to 2001. In earlier posts at the Pentagon, he served as the Under Secretary of Defense for Personnel and Readiness (1997-2000) and the Under Secretary of the Air Force (1994-1997).

Honorable William J. Lynn, III, was the 30th Deputy Secretary of Defense (2009–2011) and also served as the Under Secretary of Defense (Comptroller) (1997–2001).

Honorable Patrick J. Murphy was a captain in the U.S. Army before serving as U.S. Representative for Pennsylvania's 8th congressional district (2007–2011), becoming the only Iraq War veteran in the 110th Congress. In Congress, he authored the bill repealing "Don't Ask, Don't Tell."

Honorable Joe R. Reeder was the 14th Under Secretary of the Army (1993–1997), where he was responsible for long range planning, readiness, and financial management.

Vice Admiral Joseph Sestak (U.S. Navy, Ret.) served for 35 years including as Deputy Chief of Naval Operations and Director for Defense Policy on the National Security Council. He also represented Pennsylvania's 7th congressional district in Congress (2007–2011).

Honorable Douglas B. Wilson served as the Assistant Secretary of Defense for Public Affairs (2010–2012).

Service Women's Action Network is a nonprofit, nonpartisan organization providing national policy advocacy and direct services to servicewomen, female veterans, and their families.